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AFFIN BANK BHD

v.

TAN SRI LEE KIM YEW

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HIGH COURT MALAYA, KUALA LUMPUR
MOHAMAD ARIFF YUSOF J
[SUIT NO: D-22 NCC-277-2010]
8 DECEMBER 2010

C ***CONTRACT:*** *Terms - Construction - Intention of the parties - Factors to consider*

CONTRACT: *Formation - Concluded contract - Whether the sale and purchase of the ICULS to CHHB had been a concluded contract between them - Factors to consider - Evaluation of the evidence adduced - Effect of - Whether the plaintiff could now rely on the terms in the Put Option Agreement - Whether the clause sought to be relied on by the plaintiff a legal impossibility*

D

E A consortium of financial institutions granted a Syndicated Loan and Bridging Loan Facilities to Mega Palm Sdn Bhd ('MPSB'), a subsidiary of Avenue Assets Berhad ('AAB'). The plaintiff, then known as Affin Merchant Bank Berhad, had been part of the syndication and had acted as the agent as well. MPSB defaulted in repaying the loan facility and legal proceedings were commenced

F in the Kuala Lumpur High Court. A Settlement Agreement was reached between the parties. The settlement sum was subsequently revised, AAB was unable to settle its shortfall within the terms of the Settlement Agreement and a Supplemental Agreement was executed between the parties. The defendant then

G entered into the Put Option Agreement with each of the Term Loan Lenders on an individual basis to acquire the Irredeemable Convertible Unsecured Loan Stocks ('ICULS') issued by AAB under the Settlement Agreement. The plaintiff gave the defendant notice of its intention to exercise its option which required the

H defendant to purchase all the ICULS. The defendant failed to comply with the notice and the plaintiff terminated the Put Option Agreement. The plaintiff relying on cl. 6.2 thereof, informed Country Heights Holdings Berhad ('CHHB'), the holding company of MPSB that it would like to sell the ICULS units to CHHB for

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the amount equivalent to the nominal value of ICULS. CHHB accepted but did not complete the purchase of ICULS despite numerous assurances and extensions of time. The plaintiff informed CHHB that if they failed to pay the purchase price for ICULS within a stipulated time, it would exercise its rights on the Put Option, dispose of the "shares" and demand the shortfall (if any) from the defendant. A corporate restructuring scheme under s. 176 of the Companies Act 1965 affecting Avenue International Capital Berhad and Avenue Capital Resources Berhad (previously AAB) then took place and as a result of this s. 176 scheme of arrangement, the AAB ICULS ceased to exist. The plaintiff commenced action against CHHB for the outstanding holding costs wherein the matter was eventually settled and CHHB paid the plaintiff a sum of monies. The plaintiff then proceeded to file this suit against the defendant for the shortfall amount. The terms and construction of the Put Option Agreement then came into dispute. The sole issue that arose for determination before this court was whether the plaintiff could rely on cl. 6.2.2 of the Put Option Agreement.

Held (dismissing plaintiff's claim):

[1] On the evidence and the law, there had been a concluded Agreement for the Sale and Purchase of the ICULS by CHHB and consequently it had not been open to the plaintiff to revert to the original terms of the Put Option Agreement and claim the shortfall against the defendant. The Agreement to sell the ICULS to CHHB had been an enforcement of the plaintiff's rights under cl. 6.2.3 after the termination of the Put Option Agreement. Further, since May 2006, the AAB ICULS had ceased to exist by virtue of the share exchange distribution. Any attempt to proceed against the defendant under cl. 6.2.2 of the Put Option Agreement, since terminated, would have been based on a legal impossibility. The claim for the shortfall had been based on the sale of the exchange and distribution of shares in the open market, not the AAB ICULS *per se*. Parties had to be held to their bargain and it could not be the proper function of the court to rewrite the contract between the parties. (para 39)

Case(s) referred to:

BIMB Musyarakah Satu Sdn Bhd v Lee Kik Hooi & Ors [2009] 8 CLJ 529 HC ***(refd)***

Pacific Forest Industries Sdn Bhd & Anor v. Lin Wei-Chih & Anor [2009] 6 CLJ 430 FC ***(refd)***

Phua Corp Sdn Bhd v. Newacres Sdn Bhd [1992] 4 CLJ 2179; [1992] 3 CLJ (Rep) 274 HC ***(refd)***

Trollope v. Colls Ltd [1973] 2 All ER 262 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 176

For the plaintiff - Muralee Menon (S Kalikumari with him); M/s Jaffar & Menon

For the defendant - L Chin Pian (Lennie Ong with him); M/s Lee Partnership

Reported by Sharmini Pillai

JUDGMENT

Mohamad Ariff Yusof J:

Introduction

[1] This action, which proceeded as a full trial, concerned a claim for the sum of RM2,196,219.09 by the plaintiff against the defendant on the basis of a put option agreement entered into between the parties on 22 February 2002. As pleaded by the plaintiff in the statement of claim, the plaintiff's claim for the sum was based on an alleged shortfall arising from the total sale proceeds of 7,250,000 Irredeemable Convertible Unsecured Loan Stocks ("ICULS") and the total option price for the ICULS under cl. 6.2.2 of the put option agreement. That this was a basis of the claim could be seen pleaded in paras. 10 and 11 of the statement of claim. It was pleaded in para. 11 thus:

> Di atas arahan Plaintif, peguamcara Plaintif Tetuan Jaafar & Menon telah menghantar satu surat tuntutan bertarikh 27.10.2009 kepada Defendan dan menuntut sebanyak RM2,196,219.09 iaitu perbezaan jumlah (shortfall) di antara jumlah hasil jualan ICULS dan jumlah harga Option ICULS tersebut daripada Defendan

[2] The averments in the pleadings were reiterated by the plaintiff's witness, PW2 (Selina bte Sharifuddin) who stated in the examination in chief as follows:

Q1: Do you have knowledge of this matter which is before this court today? A

A: Yes. The plaintiff is claiming a sum of RM2,196,219.09 as at 27 October 2009 from the defendant, being the shortfall between the total sale proceeds of the ICULS and the total option price for the ICULS together with interest and costs, a right which the plaintiff is exercising pursuant to a put option agreement dated 22 February 2002. B

[3] The ICULS in question, it is be noted at the outset, were issued by a company named Avenue Assets Berhad ("AAB") (previously known as Phileo Land Berhad) to the plaintiff as part of a security arrangement arising from a restructured Syndicated Loan and Bridging Loan Facility which was initially for a total of RM270,000,000 granted by a consortium of Banks and Financial Institutions, of which the plaintiff was one. The facilities themselves were granted to a company named Mega Palm Sdn Bhd ("MPSB"). MPSB was at all material times a subsidiary of AAB. C D

[4] A series of restructurings and settlement proposals and agreements followed, and the ICULS issued by AAB became relevant when AAB was unable to settle a shortfall amount of RM27.75 million which was still owing to the term lenders. As part of the proposal for settlement, AAB agreed to issue the ICULS for a nominal value totalling RM25.75 million to the lenders. It appeared that the financial institutions then entered into separate put option agreements with the defendant by which the defendant agreed to grant to the financial institutions put options to require the defendant to purchase the ICULS at a predetermined option price totalling the above said RM25.75 million within the defined option period. E F G

[5] The present claim by the plaintiff for the shortfall constituted that portion of the RM25.75 million which was owing to the plaintiff as one of the term lenders under the restructured facilities and settlement agreements. The portion attributed to the plaintiff was RM7,250,000. H

[6] The defendant was at all material times a major shareholder of Country Heights Holdings Berhad ("CHHB"). At the material time of the issue of the ICULS, CHHB had become the holding company of MPSB through a corporate restructuring exercise. I

MPSB was the registered proprietor of a freehold land in the Mukim of Batu, District of Kuala Lumpur, Wilayah Persekutuan. CHHB then acquired all the ordinary shares in MPSB under a Sale and Purchase Agreement with AAB and the other shareholder of MPSB, namely Lucky Matrix Sdn Bhd, to develop, market and sell bungalows and other building units on that land. Country Heights Property Sdn Bhd ("CHPSB"), a subsidiary of CHHB, was developing the land at the material time. It is pertinent to note that CHHB is and was at all material times a company listed on Bursa Malaysia.

[7] It is necessary to appreciate at the outset the intricate relationships between the parties in the context of the financing arrangements so as to place the put option agreement in its proper perspective.

Summary Background Facts

[8] As indicated earlier, the Syndicated Loan and Bridging Loan Facilities of RM270,000,000 had been granted to MPSB by the consortium of financial institutions. The plaintiff, then known as Affin Merchant Bank Berhad, was part of the syndication and acted as the agent as well. One of the terms for the loan facilities was a letter of comfort dated 11 December 1996 granted by AAB, then known as PhileoLand Berhad, by virtue of its shareholding in MPSB. MPSB had defaulted in repaying the loan facility, and as a result legal proceedings commenced in the Kuala Lumpur High Court against MPSB and AAB. A settlement agreement was reached between the parties in late 2000 whereby the parties agreed, *inter alia*, to settle the civil suit and the principal sum together with all the sums due and owing through the issue of 220,000,000 units of RM1 each of five-year Redeemable Convertible Secured Loan Stocks (RCSLS) by CHHB for the amount of RM220,000,000, or such reduced sum as may be approved by the securities commission. The settlement amount was subsequently revised to RM200,000,000. Upon an appeal lodged with the securities commission, the terms were revised and approved to become as follows:

(a) CHHB was to issue the RCSLS for the value of RM148.5 million and the shortfall of RM51.5 million to be settled equally by AAB and CHHB.

(b) AAB was to settle its 50% portion of the shortfall, namely RM25.75 million in cash prior to the issuance of the RCSLS.

(c) CHHB was to settle its portion of 50% within three years from the date of issuance of the RCSLS with interest.

[9] AAB was unable to settle its shortfall within the terms of the settlement agreement and thereupon proposed to settle its portion by the issuance of RM14.5 million nominal value zero-coupon ICULS to each of the term lenders in their respective portions, and further to effect a cash payment of RM11.5 million prior to the issuance of the RCSLS.

[10] The parties then entered into a supplemental agreement dated 31 December 2001. It was in this context that the defendant then entered into the put option agreement with each of the term loan lenders on an individual basis to acquire the ICULS issued by AAB under the settlement agreement at the nominal value of RM25.75 million.

[11] The reasons why the put option was extracted from the defendant were not unanimously stated in the course of the trial. According to counsel for the plaintiff, the put option was taken from the defendant since he was the majority shareholder of CHHB, and the ICULS being in the nature of an unsecured Irredeemable Convertible Loan Stock, it became necessary to "securities" the ICULS by the put option. The defendant's version of the facts was different; he said he granted the put option to the term lenders, including the plaintiff, to assist AAB on the understanding that ultimately CHHB, being the holding company of MPSB, would settle the payment of the RM25.75 million.

[12] For reasons to be stated below, the main issue in this dispute involved an issue of construction of the put option agreement. Nevertheless, I had critically evaluated the testimonies against the contemporaneous documents. I found the defendant's version of the facts as to an implicit understanding that CHHB was the party to ultimately purchase the ICULS under the put option, could not be fully supported on these documents.

[13] Nevertheless, I dismissed the plaintiff's claim but for the other reasons stated herein below.

The Terms Of The Put Option Agreement

[14] The relevant put option agreement between the defendant and the plaintiff (exh. "P2") provided as follows:

(a) The defendant irrevocably granted to the plaintiff a right, exercisable in accordance with the provisions of the agreement, to require the defendant to purchase all or some of the ICULS issued and held by the plaintiff. See cl. 2.1.

(b) The put option period was defined as "the period commencing on the option date and ending on the last day of the tenure of the ICULS, ie, the date falling five years after the date of issue of the ICULS." This meant the ICULS were valid for tenure of five years.

(c) "Option Date" was defined as "the date following one year after the date of issue of the ICULS."

(d) "Option Completion Date" was defined as "the seventh date falling after the giving of a notice under sub-clause 2.2."

(e) "Put Option Price" was defined as "in relation to any exercise of the put option, an amount equivalent to the nominal value of the ICULS in relation to which the put option is exercised."

(f) The put option could be exercised at any time or times during the put option period by the lender (the plaintiff) serving its notice as per schedule 1 of the agreement on the defendant that it wished to exercise the put option in respect of all or some of the ICULS issued to and held by the lender.

(g) The completion procedure was set out in cl. 3.2 as follows:

> On completion of the Put Option:
>
> 3.2.1 Tan Sri Lee Kim Yew shall first pay to the Lender a sum equivalent to the put option price for the number of the ICULS in relation to which the put option is exercised, as consideration for those ICULS; and
>
> 3.2.2 Upon receipt of the sum payable under Clause 3.2.1, the Lender shall deliver to Tan Sri Lee Kim Yew the duly completed and signed instruments of transfers in favour of Tan Sri Lee Kim Yew for the subject ICULS, together with the relevant certificates.

(h) The consequences of default and the right of termination were expressly spelt out in cl. 6, which, given its importance to this dispute, deserves to be quoted in full:

> 6.1 Right to terminate
>
> In the event that Tan Sri Lee Kim Yew defaults in the performance of any of its obligations under this Agreement, the Lender shall be entitled to terminate this Agreement by giving a notice thereof to Tan Sri Lee Kim Yew.
>
> 6.2 Consequences of termination
>
> 6.2.1 If the Lender gives notice under Clause 6.1:
>
> 6.2.1.1 The Lender shall be entitled to sell all of the ICULS held by the Lender to a party other than Tan Sri Lee Kim Yew; and
>
> 6.2.1.2 Tan Sri Lee Kim Yew shall indemnify and keep the Lender indemnified against all reasonable costs, charges, expenses and losses incurred by the Lender in connection or arising from the sale of the ICULS to another party.
>
> 6.2.2 If the ICULS sold through the market, then the amount (if any) by which the total sale proceeds of the ICULS (less brokerage fees) are less than the total option price for those ICULS shall be deemed to be a loss of the Lender and be a debt due and owing from Tan Sri Lee Kim Yew to the Lender within 7 days of the Lender's demand.
>
> 6.2.3 For avoidance of doubt, if the ICULS are not sold through the market, Tan Sri Lee Kim Yew will not be responsible for any shortfall between the sale proceeds of the ICULS and the total option price for those ICULS.

Default By Tan Sri Lee Kim Yew

[15] On 5 January 2004, the plaintiff gave the defendant notice of its intention to exercise the option pursuant to cl. 2.2 requiring the defendant to purchase all the ICULS. The defendant did not comply with the notice but instead by letter dated 19 February 2004 notified the plaintiff that he did not wish to proceed with the put option and that the plaintiff was to terminate the put. The defendant's letter appeared at p. 440 of bundle B (exh. "P2"), and it read:

A Avenue Assets Berhad - LA (ICULS)

I refer to the above and your letter of 5 January 2004.

I do not wish to proceed with the put option and as mutually agreed, you shall terminate the said put option to me. ...

B

[16] The plaintiff responded on 8 April 2004 by stating:

We refer to your letter dated February 19, 2004.

Kindly advised that under Clause 6 of the Put Option Agreement C dated February 22, 2002 (hereinafter referred to as "this agreement") executed between Affin Bank Berhad ... and your goodself, only the Bank shall be entitled to terminate this Agreement upon your default in the performance of the obligations under this Agreement.

D In pursuance said Clause 6 thereof, we hereby exercise our right by terminating this Agreement effective from 8th April 2004.

As a result of the termination mentioned herein, we shall, pursuant to the said Clause 6, be entitled to sell all the ICULS held by us to a party other than your goodself; and we shall be E irrevocably and unconditionally indemnified by your goodself against all costs, charges, expenses and losses incurred by the Bank in connection with or arising from the sale of the ICULS another party.

F If the ICULS were sold through the market, then the amount (if any) by which the total sale proceeds of the ICULS (less brokerage fees) are less than the total option price for those ICULS shall be deemed to be our loss and be a debt due and owing from your goodself to us within seven days of our written demand.

G

As such, we would very much appreciate if you could kindly acknowledge receipt on the "acknowledgement of notice of termination" copy thereof. ...

Sale Of The ICULS To CHHB

H

[17] After exercising its right of termination effective 8 April 2004, the plaintiff wrote a letter to CHHB in which it purported to rely on cl. 6.2 of the put option agreement, notifying CHHB that it would like to sell the 7,250,000 units of the ICULS to CHHB I for the amount equivalent to RM7,250,000, being the nominal value of the ICULS. This letter, dated 17 May 2004 read:

Re: RM7,250,000 Avenue Assets Berhad's Irredeemable Convertible Unsecured Loan Stocks (ICULS)

Kindly be informed that under Clause 6.2 of the Put Option Agreement dated February 22, 2002 (hereinafter referred to as "this Agreement") executed between Affin Bank Berhad ... and Tan Sri Lee Kim Yew, the Bank shall be entitled to sell all the Avenue Assets Berhad's ICULS by the Bank to a party other than Tan Sri Lee Kim Yew.

In pursuance of the said Clause 6.2 thereof, the Bank would like to sell 7,250,000 units of the ICULS mentioned in this Agreement to your goodselves at the put option price of RM1.00 per unit, which is an amount equivalent to RM 7,250,000 ie, the nominal value of the ICULS.

Kindly be informed that your goodselves are to bear all costs, expenses and charges incurred or to be incurred including charges incurred by the Bank as a result of your Agreement to purchase the said ICULS thereof.

As such, we would very much appreciate if you could kindly return the duly completed "Agreement to Purchase" the above-mentioned ICULS to us before 31st May 2004 ...

CHHB Accepted The Offer To Purchase The ICULS

[18] The evidence indicated CHHB accepted the offer for the sale of the 7,250,000 ICULS by way of a letter dated 29 July 2004, which appeared on p. 443 of exh. P2. This letter was explicit in its terms and it said:

Offer for sale of 7,250,000 Avenue Assets Berhad Irredeemable Unsecured Loan Stocks ("ICULS")

We refer to your letter dated 17th May 2004.

We are pleased to inform your Bank our management has accepted the offer for the sale of 7,250,000 Avenue Assets Berhad ICULS. The sales proceeds of RM7,250,000 will be remitted to you in the fourth quarter of 2004.

We look forward to your favourable reply.

[19] Two other letters followed, namely letter dated 11 January 2005 and letter dated 3 May 2005. These letters informed the plaintiff that CHHB would like to revise the proposal for the purchase of the ICULS to take effect at a later date but CHHB

would pay "holding costs" of 6% per annum to the bank on any outstanding ICULS for the period from 17 May 2004 to the date of purchase.

[20] The letter of 3 May 2005 also included two early payments plus a cheque for the holding costs for the period from 1 March to 30 April 2005. A total of RM679,116 .44 was paid to the bank. CHHB reaffirmed that it would continue to meet the holding cost on a similar basis up to the date of purchase of the ICULS. This letter appeared on p. 445 of exh. P2.

[21] A third letter dated 11 May 2005 followed, and by this letter CHHB proposed to reschedule the purchase of the ICULS in three tranches stated as follows:

(a) First tranche of 2,250,000 in June 2005

(b) Second tranche of 2,500,000 in July 2005

(c) Third tranche of 2,500,000 in August 2005.

Letter Of Acceptance By Affin Bank Dated 16 June 2005

[22] By letter dated 16 June 2005, the plaintiff bank replied to CHHB, and confirmed the rescheduling whereby the payment due dates were to be 30 June 2005 for 2,250,000 ICULS, 30 July 2005 for 2,500,000 ICULS and 30 August 2005 for 2,500,000 ICULS, with holding costs and Brokerage Fees due. The total amount due was stated as RM7,353,116.99. This letter appeared on p. 457 of exh. P2.

[23] To be fair to the plaintiff, this letter ended with a caveat reading:

> Please note that the payments have to be received by us by the date stated for the respective tranches failing which, the Bank reserves the right to:
>
> (i) Cancel the above Settlement arrangement without any reference to you.
>
> (ii) Refer to the original Settlement Agreement or any other Arrangement as the Bank deems appropriate.

[24] CHHB did not complete the purchase of the ICULS despite the numerous assurances and extensions of time and it appeared that CHHB paid the holding cost to the plaintiff only up to

31 August 2006. By letter dated 5 February 2007, the plaintiff notified CHHB that in the event the full amount of the purchase price of the ICULS was not settled within the stipulated time, the plaintiff would exercise its rights on the put option and dispose of the "shares" and demand the shortfall (if any) from the defendant.

The "Shares" Arising From Share Exchange And Distribution Exercise

[25] The letter of 5 February 2007 referred to the disposal of "shares" instead of the ICULS. The reason for this was to be explained with reference to a Corporate Restructuring Scheme under s. 176 of the Companies Act 1965 affecting Avenue International Capital Berhad and Avenue Capital Resources Berhad (previously AAB) under which the 7,250,000 ICULS AAB were exchanged for 3,320, 500 ECM Libra Avenue Berhad shares coupled with the distribution *in specie* of 670,675 shares in Pos Malaysia & Services Holdings Berhad. The s. 176 scheme of arrangement was the result of a merger and acquisition exercise between Avenue Capital Resources Berhad and ECM Libra Berhad *via* Avenue International Capital Berhad's acquisition of all the operating subsidiaries of ECM Libra. Avenue International Capital Berhad changed its name to ECM Libra Avenue Berhad.

[26] It was part of the inter-conditional terms of the scheme of arrangement and restructuring that there be an exchange of the ICULS for the ECM Libra Avenue Berhad shares and a distribution *in specie* of the Pos Malaysia shares.

[27] The notice of share exchange and distribution dated 16 June 2006 was sent to the plaintiff, and this could be seen on p. 762 (exh. "P17") of Bundle C. The entitlement date was expressed as 22 May 2006.

[28] As a result of the s. 176 scheme of arrangement, the AAB ICULS simply ceased to exist with effect from 22 May 2006.

[29] It has to be noted that this was a date after the acceptance by the plaintiff of CHHB's request for the rescheduling of the purchase of the AAB ICULS by CHHB.

Suit Against CHHB

[30] About four months after the letter sent by the plaintiff to CHHB on 5 February 2007, the plaintiff commenced a suit against CHHB for the sum of RM202,003.89 for outstanding holding

costs. The suit was eventually settled by CHHB and it paid to plaintiff a sum of RM200,000. The dividends accruing from the ECM Libra and Pos Malaysia shares were set-off from the amount outstanding by CHHB to the plaintiff. It is noteworthy that although there was a contract by CHHB to purchase the AAB ICULS, the plaintiff chose to proceed against CHHB only for the outstanding holding costs.

Disposal Of The Shares

[31] Thereafter and between 9 May 2007 and 10 May 2007, the plaintiff started disposing of the 670,675 Pos Malaysia shares in the open market, for which it received total sale proceeds of RM2,982,037.05. Between 7 October 2009 and 14 October 2009, the plaintiff sold the 3,320,500 ECM Libra Avenue shares through the open market for which the total sale proceeds of RM2,071,743.86 was received. Thus, a total proceed of RM5,053,780.91 was received. The put option price being RM7,250,000, there was the shortfall of RM2,196,219.09 which became the subject matter of the present claim against the defendant.

The Principle Issue: Could The Plaintiff Rely On cl. 6.2.2 Of The Put Option Agreement

[32] The plaintiff in this claim, as stated at the outset of the grounds of judgment, based its claim against the defendant on the latter's obligation under the put option agreement, in particular cls. 6.2.2. The critical issue was whether it could do so in law given the express wording of the put option agreement and the contractual intent between the parties.

[33] The defendant replied to the claim in very simple and decisive terms, namely the plaintiff had no cause of action against the defendant for the reason that the alleged shortfall could not be attributed to any sale of the AAB ICULS, which had ceased to exist, at the time of the purported sale through the open market. The sale in the open market was the sale of shares of ECM Libra Avenue and Pos Malaysia Berhad - according to Defendant's counsel, a sale of Non-ICULS shares, not the ICULS themselves. I came to the view that there was merit in the defendant's argument, based on the clear terms of the put option agreement.

[34] I was not persuaded by the plaintiff's argument that the put option granted by the defendant was a form of "securitisation". It was no doubt a form of "security", and as a form of "security" it had to be construed in accordance with the strict terms and conditions agreed between the parties. That an ICUL is a form of security has been acknowledged in *BIMB Musyarakah Satu Sdn Bhd v Lee Kik Hooi & Ors* [2009] 8 CLJ 529. It did not however "securitise" the debt owing by PMSB or for that matter, the ICULS. It did not create an investment instrument by pooling assets or debts to back that instrument. The put option merely conferred the right on the plaintiff to require or "put" to the defendant an obligation to purchase the ICULS at the agreed option price within the option period on terms and conditions expressly spelt out in the agreement, and these terms and conditions did not contemplate the event related to the share exchange and distribution pursuant to the scheme of arrangement under s. 176 involving the merger between AAB and ECM Libra. The ECM Libra Avenue shares and the Pos Malaysia shares could not in law regarded as equivalent to the ICULS or even converted shares from the ICULS. By its very concept and definition, an ICUL can only be converted into its "mother" share. Being AAB ICULS, the conversion could only be into AAB shares as the "mother" shares. To succeed in its argument, the plaintiff's case would have to rest on a legal impossibility, quite apart from the other issue of whether the plaintiff should have in the first place proceeded against CHHB itself.

[35] Plaintiff's counsel objected to the defendant's argument on this principle issue on an equally simple ground, namely that it was not pleaded. In this connection, counsel was relying on the absence of any pleading on the agreement being "frustrated". The technical rules of pleading, in my view, do not require the use of particular, exact legal words as long as there were sufficient particulars stated so as to raise the particular defence in law. To this extent, I agreed with defendant's counsel that the case cited by plaintiff's counsel, namely the Federal Court decision in *Pacific Forest Industries Sdn Bhd & Anor v. Lin Wei-Chih & Anor* [2009] 6 CLJ 430 in fact supported the defendant's argument. The relevant passage read:

> There was nothing in the pleadings that could be related to frustration. It is trite that in pleading frustration, particulars which give rise to frustration must be provided specifically in the pleadings. The parties in this case had not pleaded or submitted that the contract question had been frustrated ...

[36] The stress in this passage was on "particulars" which had to be provided specifically in the pleadings. So long as they were particulars which supported a plea of frustration, the rules of pleading would allow the defendant to submit on it. On this, I found sufficient particulars pleaded in the statement of defence. See in particular paras. 9, 17, 18 and 19 of the statement of defence.

[37] Thus, given the express terms and conditions in the put option agreement, it would have been improper to have construed the claim in a way not intended by the parties. As often stated, it is not the function of the court to rewrite a contract for the parties. See for instance the case cited by the defendant, *Phua Corp Sdn Bhd v. Newacres Sdn Bhd* [1992] 4 CLJ 2179; [1992] 3 CLJ (Rep) 274:

> ... in the interpretation of the terms of a private contract the judge is not to impose new terms in or rewrite a contract and his function is only to express intention of the parties to the contract ...

[38] See also *Trollope v. Colls Ltd* [1973] 2 All ER 262, cited in *Phua Corp Sdn Bhd v. Newacres Sdn Bhd*:

> The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings; the clear terms must be applied even if the court thinks some other terms would have been more suitable ...

Conclusion

[39] On the evidence and the law, I found there was a concluded agreement for the sale and purchase of the ICULS by CHHB, and consequently it was not now open to the plaintiff to revert to the original terms of the put option agreement and claim the shortfall against the defendant. The agreement to sell the ICULS to CHHB was an enforcement of the plaintiff's rights under cl. 6.2.3 after the termination of the put option agreement. Further, since 22 May 2006 the AAB ICULS had ceased to exist by virtue of the share exchange and distribution. Any attempt to proceed against the defendant under cl. 6.2.2 of the put option agreement, since terminated, would be based on a legal

impossibility. The claim for the shortfall was based on the sale of the exchange and distribution shares in the open market, not the AAB ICULS *per se*. Parties here have to be held to their bargain and it cannot be the proper function of this court to rewrite the contract between the parties.

[40] In the circumstances therefore, I dismissed the claim with costs of RM30,000 to be paid by the plaintiff to the defendant within one month from the date of this court's order.